IN THE HIGH COURT OF BOMBAY AT GOA.

CIVIL REVISION APPLICATION NO. 209 OF 2002.

M/s. Dailo Oil Distributors,
by its Proprietor Shri
Digambar V. Lotlikar,
r/o Japan Bazar, Thana,
Cortalim, Mormugao. ... Applicant.

Versus

M/s. Bhavana Traders,
'Safalya', Ground Floor,
Off Dr. Dada Vaidya Road,
Boca de Vaca, Panaji,
through its partners:
(a) Shri Prashant Pai,
(b) Shri Rajesh Talaulikar,
both r/at Panaji. ... Respondents.

Mr. A. Dessai, Advocate for the Applicant.

Mr. U. Rao, Advocate for the Respondents.

Coram: P.V. HARDAS, J.

Date: 17th October 2002.

ORAL JUDGMENT.

By consent of parties, this Civil Revision Application is taken up for final disposal.

2. This revision application has been filed against the Order passed by the Civil Judge, Senior Division at Ponda, dated 28th November 2001, in Civil Miscellaneous Application No. 3/2001/A arising in Special Civil Suit No. 38/1998/A, whereby the learned trial Court allowed the application at Exhibit 1, filed by the respondents, for restoration of the suit, which was dismissed for want of prosecution on 25th October 2000.

3. The brief facts necessary for the decision of this revision application are stated hereunder:-

The respondents herein had filed Civil Suit against the present applicant, which came to be dismissed for want of prosecution on 25th October 2000. The respondents herein filed an application at Exhibit 1, on 19th January 2001, praying for restoration of the suit. The said application for restoration was accompanied by an application for condonation of delay. The application for condonation of delay is at Exhibit 3. The application for restoration was registered as Civil Miscellaneous Application No. 3/2001/A. In the application for condonation of delay it was stated that the applicants rely on the contents of the application for setting aside the Order of dismissal and sought condonation of delay in filing the said application.

4. In support of the prayer for setting aside the Order of dismissal of the suit for want of prosecution, the respondents/plaintiffs have stated that the Civil Suit was fixed before the Court on 25th October 2000 at 10.30 a.m.. The respondents/plaintiffs were required to attend the Court of Judicial Magistrate, First Class, at Panaji in respect of a criminal case under Section 138 of the Negotiable Instruments Act. It was agreed between the parties that the applicant, who was the

accused in the criminal case under Section 138 of the Negotiable Instruments Act, would make payment before the Judicial Magistrate, First Class and, thereafter, the criminal case would be withdrawn and then the plaintiffs and the defendant would drive down to Ponda for filing the consent terms in the Civil Suit, which came to be dismissed for want of prosecution. The respondents/plaintiffs had asked one Gurudas Salgaonkar, an employee, to attend the Civil Suit at Ponda. However, the said Gurudas Salgaonkar, it is stated, forgot to go to Ponda and, consequently, the Special Civil Suit came to be dismissed for want of prosecution. It is also stated in the application that on inquiry made by the counsel for the respondents, it transpired that no one had attended the Civil Suit at Ponda and that is how the respondents/plaintiffs learnt about the dismissal of the Civil Suit. The application for restoration was accompanied by an affidavit of Gurudas Salgaonkar, who has stated that due to the pre-occupation of work, he had forgotten to attend the Civil Suit. In the reply filed by the applicant/defendant, to the application for restoration, it was not seriously disputed that the parties had agreed to first attend the criminal case at Panaji and then to proceed to attend the Civil Suit at Ponda. In the reply it was contended that there was no explanation offered for condonation of delay.

5. The learned Civil Judge, Senior Division at Ponda, by his Order, which is impugned in the revision, restored the suit of the plaintiffs by setting aside the Order of dismissal for want of prosecution. The learned trial Court has stated that the suit was for recovery involving a huge amount. The trial Court also held that the defendant had not been served and the plaintiffs should be given an opportunity to ventilate their grievance. The learned trial Court also held thus:-

> "Accordingly plaintiff has made out a prima facie case for granting the relief as prayed for by him in the application under consideration and as such the said application stands allowed as prayed for ....."

6. Mr. Dessai, the learned counsel appearing for the applicant, has urged before me that the learned trial Court has not decided the application for condonation of delay and has proceeded to grant relief of restoration of the suit without deciding the application for condonation of delay. He has also urged before me that the Order of the learned trial Court is replete with factual errors as the learned trial Court has observed that the defendant was not served with suit summons. Mr. Dessai has relied on the certified copy of the Roznama, which shows that the defendant was served before the suit came to be dismissed for want of prosecution. It is also urged by Mr. Dessai that the Order of the trial Court discloses that the

applicant/defendant was absent at the time of arguments, which, again, is factually incorrect as perusal of the Order sheet dated 30th June 2001 shows that the counsel representing the applicant/defendant was heard. Mr. Dessai has also submitted that the learned trial Court has restored the suit on merits and has not adverted as to whether the reason given by the respondents/plaintiffs for remaining absent was justified or not. In support of this Mr. Dessai has relied on the Full Bench decision in **Municipal Corporation of Ahmedabad, through the Municipal Commissioner v. Voltas Limited and etc. etc.,** A.I.R. 1995 Gujarat 29.

7. Mr. Rao, the learned counsel appearing for the respondents/plaintiffs, has invited my attention to the Order sheet of the learned trial Court dated 30th June 2001, which evidences that the party was heard on Exhibits 1 and 3, that is, application for restoration and application for condonation of delay. The case was thereafter adjourned to 18th July 2001 for orders. Mr. Rao has placed reliance on the Judgment of the Apex Court in **Davinder Pal Sehgal and another v. M/s. Partap Steel Rolling Mills P. Ltd. and others,** 2001 AIR SCW 5065. Thus, according to Mr. Rao the learned counsel for the respondents/plaintiffs, the Court had considered the question of delay and though the Order

does not in specific terms state that the delay has been condoned, it is apparent that the Court has considered and has condoned the delay in filing the restoration application.

8. Mr. Rao has invited my attention to the Judgment of the Apex Court in Davinder Pal Sehgal and another v. M/s. Partap Steel Rolling Mills P. Ltd. and others (supra) and particularly to paragraph 7 thereof, which reads as under:-

> "7. We have perused the restoration application as well as petition filed under Section 5 of the Limitation Act for condonation of delay in filing the same. It appears that in the application for restoration, all relevant facts have been stated not only to show that the plaintiffs had sufficient cause for non appearance on 24th August, 1988 but also to show sufficient cause for condonation of delay in filing the restoration application. This is the reason why in the petition for condonation of delay, it has been simply stated that facts stated in the restoration application may be taken into consideration for condonation of delay in filing the restoration application. Therefore, merely because in the order of trial Court, specifically, there is no reference to petition for condonation of delay, it cannot be said that it did not consider the same. From a bare perusal of the order, it would appear that the grounds stated in the restoration application for non appearance on 24th August, 1988 as well as delay in filing the restoration application having found favour with the trial Court, the suit has been restored, therefore, it cannot be said that the

> order of restoration has been passed without condoning the delay in filing the restoration application. The submission of the learned counsel appearing on behalf of the respondents that application for restoration filed on behalf of the plaintiffs was dismissed earlier for non prosecution cannot be taken to be a ground for throwing out the restoration application as the High Court on the earlier occasion set aside order of the trial Court whereby restoration application was dismissed for non prosecution and the said order attained finality. In view of these facts, we are of the opinion that trial Court had not acted in the exercise of its jurisdiction illegally or with material irregularity and accordingly the High Court was not justified in interfering with its order in the exercise of revisional jurisdiction."

9. Though, as rightly pointed out by Mr. Dessai, there are factual errors in the Order of the learned trial Court, but, the factual errors by themselves do not indicate that the trial Court had exercised its jurisdiction with any material irregularity. The trial Court in its Order does not only make a reference to the fact that the suit is restored because the plaintiffs have to recover a substantial amount from the defendant but it also discloses that the Court has taken into consideration the reason for non-appearance of the plaintiffs when the suit came to be dismissed for want of prosecution. In fact, the reason for non-appearance of the plaintiffs has not been seriously controverted by the applicant/defendant in his reply before the trial Court. The Judgment of the Apex Court really clinches

the issue and, therefore, according to me, there is no material irregularity in the exercise of jurisdiction by the trial Court.

10. Civil Revision Application is, thus, devoid of any merit and the same is dismissed with no order as to costs.

(P.V. HARDAS)
JUDGE.

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